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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESSE RODRIGUEZ, Defendant and Appellant.	G041873 (Super. Ct. No. 06NF4043) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Glenda Sanders, Judge. Affirmed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

THE COURT:[*]

A jury found Jesse Rodriguez guilty of committing a lewd act upon a minor under the age of 14 (Pen. Code, § 288, subd. (a)), and found true the allegation he had substantial sexual conduct with her (Pen. Code, § 1203.066, subd. (a)(8)). The trial court sentenced him to the mid-term of six years in prison. On appeal, he argues the court improperly excluded defense evidence the victim had been coached by the prosecutor and the victim's mother while testifying in the first trial which had deadlocked. We find no abuse of discretion and affirm the judgment.

I

The victim testified that when she was eight years old she used to stay at her grandmother's house. On several occasions while she was watching television, Rodriguez, her grandmother's boyfriend, would put his hands inside her clothing and touch her vaginal area. He told her not to tell anyone.

The victim also testified that one morning during that summer she was in her own apartment when Rodriguez came to babysit her, her brother and sister, and a cousin who was two years younger. While she was watching television, Rodriguez told her to sit in his lap. He pulled down her pants and placed his penis on her exposed buttocks. She testified she felt something wet on her buttocks and when she got down she saw his penis. Her cousin, who was standing in the kitchen doorway, saw the victim sitting on Rodriguez's lap. She saw him rubbing his penis on the victim's exposed buttocks.

Rodriguez was charged by information with two counts of lewd conduct with a child under the age of 14. The matter was tried before a jury but ended in a mistrial when the jury deadlocked 10-to-2 for conviction. He was retried some months later and the jury acquitted him on count one, which involved the allegations of

[*] Before Rylaarsdam, Acting P. J., Fybel, J., and Ikola, J.

molestation at the grandmother's house, and found him guilty on count two, which involved the masturbation incident at the victim's house.

II

Rodriguez called his brother-in-law as a defense witness. He had been a witness at the first trial and was asked, relative to the first trial: "When you were in court, watching her testify, did you notice anything unusual about the manner in which she answered the questions?" After the prosecution's objection was sustained, he was asked: "Did you see, in the courtroom, anyone else in the courtroom who was prompting [the victim] in her answers?" The prosecution again objected and the court called counsel into chambers.

When asked where counsel was going with this, defense counsel made the following offer of proof. "[He] will testify, during the time he was in court, he saw the witness being prompted by the district attorney and by her mother in her answers." When asked what "prompted" meant, counsel stated: "What he's informed me, Your Honor, as he was in the courtroom—he was watching as the questions were being asked. And he watched the district attorney—not this district attorney—make motions up and down and back and forth with her head. [¶] And, also, her mother was in the courtroom making similar motions, as she looked over for guidance how to answer the questions. [¶] That goes directly to her credibility on the stand." According to defense counsel, this information was only disclosed by the witness to counsel that morning.

The trial court stated: "The evidence is excluded because it does appear to be highly speculative. It's, essentially, [the brother-in-law's] opinion as to what those head gestures—if they were, indeed, head gestures—were intended for and whether they had any affect [*sic*] upon the witnesses. [¶] Also it's speculative. Many of us sit and—quite often, when I'm on the bench, I nod in order to be a cooperative listener. It does not necessarily mean that I'm agreeing with the assertion made but just as 'I understand.' And so head nods and shakes are notoriously difficult to interpret, which is why we insist

on audible responses, on the record. [¶] Even to the extent it may be probative of the fact that the witness was being coached from afar, its probative value, I believe, is outweighed by its unduly prejudicial effect; and, that, it has limited probative value because of the speculative nature, but it's highly prejudicial because, obviously, if the jury accepts that they—she were being coached, it would undermine the witness' testimony unduly fairly—unfairly."

Rodriguez recognizes that the Supreme Court has held under Evidence Code section 352 that the trial court exercises "broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; see also *People v. Singleton* (2010) 182 Cal.App.4th 1, 10.) The exercise of such discretion will not be disturbed on appeal except where it can be shown the court acted in an arbitrary or capricious manner.

Rodriguez argues the exclusion of the evidence of coaching at the prior trial was an abuse of discretion because the brother-in-law's testimony "would have been short and just minutes in duration," the victim's credibility was "already a key issue at trial and the subject of the testimony of virtually every witness," and Evidence Code sections 780 and 1101 permit the admission of evidence that has any tendency to prove or disprove the truthfulness of a witness's testimony. In the end, he asserts that, "In a contest of credibility, evidence that [the victim] may have been coached in her testimony would have been compelling evidence in impeaching her testimony at trial and in corroborating appellant's defense."

His argument, however, glides over the trial court's reason for excluding the evidence: it was speculative. In other words, the court concluded the brother-in-law could testify to nothing more than that the prosecutor and the victim's mother maybe nodded or shook their heads while the victim testified in the first trial. It would only be his opinion as to whether those head shakes were actually signals and whether the victim

had been being coached. Nothing in the record of the first trial suggests the victim had been coached, or that anyone then (e.g., the court or defense counsel) expressed any view that the witness was being coached. Given the highly speculative nature of the brother-in-law's proposed evidence, we cannot say the trial court abused its discretion in excluding it.

Even if there had been an abuse of discretion, reversal would not be warranted. There was independent evidence from another witness, the victim's cousin, who saw Rodriguez rubbing his penis on the victim's exposed buttocks. It is therefore not reasonably probable that a more favorable result would have occurred had the brother-in-law been allowed to testify that he thought the victim might have been coached by the prosecutor and the victim's mother in the first trial.

III

The judgment is affirmed.